INDEX

673913—63——1

CITATIONS

Cases: Page

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 506

UNITED STATES OF AMERICA, APPELLANT

v.

JERRY BRAVERMAN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

OPINION BELOW

The order dismissing the indictment (R. 9–10) is not reported.

JURISDICTION

The order of the district court dismissing the indictment for failure to charge an offense under Section 1 of the Elkins Act was entered on June 26, 1962 (R. 9–10, 26). Notice of appeal to this Court was filed in the district court on July 26, 1962 (R. 27–28). Probable jurisdiction was noted on December 17, 1962 (R. 28). The jurisdiction of this Court to review, on direct appeal, a judgment dismissing an indictment based on a construction of the statute upon

which the indictment is founded is conferred by 18 U.S.C. 3731.

STATUTE INVOLVED

Section 1 of the Elkins Act (32 Stat. 847, as amended, 34 Stat. 587–588, 49 U.S.C. 41(1)), provides in pertinent part:

> * * * The willful failure upon the part of my carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeandor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeandor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person, or any officer or director of any cor-

poration subject to the provisions of sections 41, 42, or 43 of this title or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. * * *

QUESTION PRESENTED

Whether an indictment charging that an employee of an interstate shipper solicited a rebate from a common carrier in respect to the transportation in interstate commerce of the shipper's property states an offense under the Elkins Act, even though it does not allege (and the government does not intend to prove) that some advantage would have accrued to the shipper had the rebate been granted.

STATEMENT

On June 6, 1962, a three-count indictment was returned in the United States District Court for the Southern District of California, charging that appellee, an employee of the Andrew Jergens Company, violated Section 1 of the Elkins Act, *supra*, pp. 2–3, by soliciting rebates from a common carrier in respect to the transportation of his employer's property in interstate commerce (R. 1–3). The pertinent facts, as detailed in the indictment, are as follows:

The Andrew Jergens Company, a corporation engaged in the manufacture, distribution, and sale of

cosmetics and toiletries, maintains a distribution office and warehouse in Burbank, California, from which it ships some of its products in interstate commerce.[1] During the period from January 23, 1962, until March 6, 1962, the Jergens Company utilized the services of Superior Fast Freight, a freight forwarder, for various interstate shipments of its merchandise from Burbank, California, to points in Oregon and Washington.

Count one of the indictment charged that, on or about January 20, 1962, the appellee, who was employed by the Jergens Company as transportation manager of its Burbank branch, "did knowingly solicit" from Eugene Allen, traffic solicitor of Superior Fast Freight, a "concession and rebate" of two percent of the total freight bill revenues that Superior Fast Freight would receive in respect to any property tendered to it by the Jergens Company at Burbank and Los Angeles, California, for transportation in interstate commerce (R. 2). Count two charged that on or about February 12, 1962, appellee knowingly solicited a rebate of $200 for shipments by the Jergens Company (R. 2–3), and count three charged appellee with a similar solicitation on February 21, 1962, of $150 for every $3,000 in freight revenues received by Superior Fast Freight from the Jergens Company (R. 3). Each count charged further that, if the solicited rebate had been granted, the property of the Andrew Jergens Company would have been trans-

[1] The principal business office of the Andrew Jergens Company is located in Cincinnati, Ohio.

ported at a lesser rate than that set forth in the applicable tariffs of Superior Fast Freight which are published and filed with the Interstate Commerce Commission.[2]

On June 26, 1962, after hearing argument of counsel (R. 10–26), the district court issued an order dismissing the indictment on the ground that it failed to charge a violation of the Elkins Act in that it did not allege, nor did the government intend to prove, that the Andrew Jergens Company (the shipper) would have gained an advantage had the request for a rebate by appellee (its employee), been granted (R. 9–10, 24).

SUMMARY OF ARGUMENT

The district court held that the indictment in the present case did not charge an offense because it did not allege (and the government did not intend to prove) that appellee's employer would have obtained an advantage if the solicited rebate had been granted. In construing the Elkins Act to require a showing of an advantage to a particular shipper, the district court interpreted the statute contrary to the purpose of Congress in enacting the legislation. Congress sought to prevent the possibility of discrimination and to protect carriers from the pressures of ship-

[2] The Interstate Commerce Act, Part IV, as amended, 56 Stat. 284 (Sec. 421(g), 49 U.S.C. 1021(g)), makes applicable to freight forwarding services the provisions of the Elkins Act. The indictment specified that Superior Fast Freight was a forwarder subject to the Interstate Commerce Act and the subsequent Acts amendatory thereof (R. 1).

pers by proscribing *all* departures from the published tariff.

A. The language of Section 1 of the Elkins Act manifests this broad purpose. Congress made it a criminal offense for any person to solicit a rebate with respect to the interstate transportation of property by a common carrier which would result in the property being transported at a lower rate than that set forth in the published tariffs. The rate is lower if the carrier gives a rebate to any person who arranges the shipment. There is no additional statutory requirement that benefit to a particular shipper result from the rebate. Consideration of the other provisions of the Elkins Act establishes that any such additional requirement would be inconsistent with the structure of the Act.

B. The legislative history of the Elkins Act compels the same conclusion. The Interstate Commerce Commission reported to Congress that large trusts were secretly getting uniform cut rates with respect to the interstate transportation of meat products and that prosecution under existing legislation was not feasible since it could not be shown that there was discrimination among these shippers. The Commission urged that departure from the published rate be made *per se* illegal. The House Report on the bill which became the Elkins Act clearly shows that Congress agreed. When in 1906 Congress adopted the Hepburn Act, it reiterated its aim to put a complete stop to rebates in every shape and form, and to prevent any departure whatever from the published tariff rates.

C. The pertinent case law also reveals consistent judicial recognition that no advantage to a particular shipper need be shown in prosecutions for acts which result in a departure from the published rates. See *e.g., United States* v. *Delaware, L. & W. R. Co.*, 152 Fed. 269, 273 (S.D.N.Y.); *Dye* v. *United States*, 262 Fed. 6, 9 (C.A. 4); *United States* v. *Miller*, 18 F. Supp. 389, 390–391 (D. Neb.). Several cases have upheld the applicability of the Elkins Act to conduct indistinguishable from that alleged in the indictment of Braverman.

D. The decision below would undermine the purposes of the Elkins Act in several important respects.

1. It could lead to economic injury to, and rate wars among, carriers. Carriers would be forced either to pay the "bribe" demanded by the traffic manager of a shipper or lose the shipper's business. If such practices spread, the result would be unfair and destructive secret competition contrary to the purpose of the Elkins Act and the more recent Congressional announcement under its "National Transportation Policy".

2. The ruling that prosecutions depend on proof that a particular shipper obtained an advantage as a result of a rate departure would reinstate a burden of proof which Congress deliberately eliminated when it adopted the Elkins Act.

3. The ruling below impairs Congress' purpose to insure that transportation rates will be openly established and rigidly followed. The public interest in an adequate and efficient transportation system, run at

reasonable charges, can be fully served only if there can be complete reliance upon the representation that the published rate is the rate actually charged.

ARGUMENT

THE ELKINS ACT PROSCRIBES ANY DEPARTURE—WHETHER ATTEMPTED OR ACTUAL—FROM A CARRIER'S OPEN PUBLISHED TARIFFS, IRRESPECTIVE OF WHETHER ANY PARTICULAR SHIPPER OBTAINS AN ADVANTAGE THEREBY

The single issue posed in this case is whether an indictment which charges that an employee of an interstate shipper solicited a rebate from a common carrier in respect to the transportation of his employer's property in interstate commerce states an offense under Section 1 of the Elkins Act, *supra*, pp. 2–3, even though the indictment does not charge that the rebate, if it had been granted, would have benefited the shipper. The district court held that the indictment did not charge an offense because it did not allege that the shipper (appellee's employer) would have obtained an advantage from the rebate. As the district judge phrased his judgment, he was "convinced" that the Elkins Act would "apply only in a case whereby any advantage or discrimination is practiced in favor of the shipper." (R. 24, see R. 9–10, 26.)

This interpretation improperly narrows the statute and impairs its purposes. It erroneously assumes that the Elkins Act meant to prohibit only the obvious discrimination among shippers which occurs where one obtains an advantage denied to another

overlooking the fact that Congress wanted to eliminate all possibility of discrimination by outlawing any departure whatsoever from the published rate. The patent inequality which takes place whenever a particular shipper achieves an advantage over his competitors as a result of a rebate was already prohibited by the original act of 1887.[3] In the Elkins Act, Congress sought to extirpate all discriminatory practices—the sophisticated as well as the crude—by prohibiting any diminution or departure from the published, open tariff. In short, it sought to prevent discrimination by maintaining the integrity of open, published tariffs.

A. THE STATUTORY LANGUAGE SHOWS THE CONGRESSIONAL PURPOSE TO MAKE IT A CRIME TO DEPART FROM THE PUBLISHED TARIFF IN RESPECT TO THE INTERSTATE SHIPMENT OF PROPERTY, REGARDLESS OF THE PERSON OR PERSONS ACTUALLY BENEFITED BY SUCH A DEPARTURE

The Elkins Act makes it a criminal offense, *inter alia,* for "any person * * * to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier * * *." In precise terms, therefore, the statute proscribes the acts charged as

[3] See Sen. Rep. No. 46, Part I, 49th Cong., 1st Sess., pp. 188–191, 215–216; Sharfman, *The Interstate Commerce Commission*, Part I, pp. 17–21 (1931 ed.).

criminal in this case: Appellee solicited a rebate relating to the transportation of property in interstate commerce by a common carrier whereby such property would be transported at a rate less than that provided for in the published tariff. There is nothing in the statutory language which imposes, as an additional prerequisite to criminal responsibility, the requirement that it be shown that the rebate, had it been granted, would have accrued to the benefit of a shipper.[4] Indeed, consideration of other provisions of the Elkins Act, as amended, establishes beyond doubt that the central and controlling purpose of the Act was to preserve the integrity of the published tariff, without any attempt to trace the consequences resulting from a departure.

Section 41(2) of Title 49 provides that any departure by a carrier from the filed tariff rate "or any offer to depart therefrom, shall be deemed to be an

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[4] The coverage of the statute is plainly not limited by the penalty clause of Section 1 (see *supra*, pp. 2–3) which, among other things, punishes a violation by "[e]very person or corporation, whether carrier or shipper." As this Court has said, these words "were added by the Hepburn Act [34 Stat. 584, 588] as an amendment to § 1 of the Elkins Act to make clear that the earlier phrase 'any person, persons or corporation' included shippers as well as carriers. In our view action by any person to bring about discriminations in respect to the transportation of property is rendered unlawful by the Elkins Act. Any other conclusion would do violence to a dominant purpose of carrier legislation." *Union Pacific R. Co.* v. *United States*, 313 U.S. 450, 463; see also *Spencer Kellogg & Sons* v. *United States*, 20 F. 2d 459, 461 (C.A. 2), certiorari denied, 275 U.S. 566.

offense under this section." The provision operates without regard to any showing of advantage to, or discrimination among, particular shippers. Section 41(3) declares that any shipper or other person delivering property to a common carrier for interstate transportation who receives from the common carrier any rebate from the published tariff rates is subject to a civil penalty. Again, the existence of discrimination is irrelevant. Section 43 directs the the Interstate Commerce Commission to institute an equity proceeding whenever it has reason to believe that a common carrier is transporting passengers or freight at less than the published rates and, "upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs * * *" regardless of whether any discrimination among shippers is also shown. Finally, the very provision which formed the basis of the present indictment is merely the last half of a sentence which begins by making it a misdemeanor for any carrier to fail strictly to observe its filed tariffs regardless of the nature or results of the departure.

Construed against the background of these complementary provisions, the scope of the Act's prohibition of solicitation of rebates by any person is entirely clear. Even without an explicit provision prohibiting solicitation of departures from the filed tariff, any such solicitation would, we assume, be punishable under 18 U.S.C. 2 as an attempt to induce or procure the commission of a crime by the carrier. Sec-

tion 41(1) of Title 49—the basis of the present indictment—merely made it absolutely clear that not only a carrier's departure from the tariff but the solicitation, by any person, of a departure is unlawful.[5]

Thus, both the plain language of the applicable provision of the Elkins Act and the character of its other prohibitions reveal the congressional purpose "to prevent a departure from the published rates and schedules in any manner whatsoever." *American Express Co.* v. *United States,* 212 U.S. 522, 532. The statute aims to "prohibit, not only discrimination as between shippers, but departure from the tariff rates, irrespective of its actual discriminatory effect." *Vandalia R. Co.* v. *United States,* 226 Fed. 713, 716 (C.A. 7), certiorari denied, 239 U.S. 642. To rule, as did the district court, that the statute proscribes solicitation of a rebate[6] only where it can be shown that it is intended to benefit a shipper (or harm a competitor) is "to restrain the effect of the language used so as not to include acts exactly described * * *." See *United States* v. *Koenig Coal Co.,* 270 U.S. 512, 519.

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[5] It is well settled that the success of the solicitation is immaterial on the question of the applicability of the criminal sanctions of the Act. *E.g., United States* v. *Koenig Coal Co.,* 270 U.S. 512, 519–520; *United States* v. *Bunch,* 165 Fed. 736, 738 (E.D. Ark.).

[6] There is no reason to limit the word "rebate" to payment back to a shipper. It simply means that traffic is carried in interstate commerce at a charge in dollars and cents less than the published rate. See *United States* v. *Michigan Portland Cement Co.,* 270 U.S. 521, 524; *Vandalia R. Co.* v. *United States,* 226 Fed. 713, 716 (C.A. 7), certiorari denied, 239 U.S. 642.

B. THE LEGISLATIVE HISTORY OF THE ELKINS AND HEPBURN ACTS CONFIRMS THE PURPOSE OF CONGRESS TO PROHIBIT ANY DEPARTURE FROM (OR SOLICITATION OF A DEPARTURE FROM) THE CARRIER'S PUBLISHED RATES

1. The Elkins Act. The legislative history of the Elkins Act confirms what the language makes evident—that Congress meant the statute to apply to any person who offered, solicited, granted, or received a reduction from the publicly established rate, and that it intended the statute's prohibitions to be applicable wholly without regard to any showing of discrimination in favor of any particular shipper.

The Elkins Act was passed in order to plug the loopholes and repair the weaknesses which experience had revealed in the enforcement of the original Interstate Commerce Act of 1887 (24 Stat. 379). Cf. *United States* v. *Metropolitan Lumber Co.*, 254 Fed. 335, 341 (D. N.J.); *Chicago & A. Ry. Co.* v. *United States*, 156 Fed. 558, 562 (C.A. 7), affirmed, 212 U.S. 563. It represented legislative acceptance of principles repeatedly urged on Congress by the Interstate Commerce Commission. Moreover, it was supported not only by shippers but by carriers which were concerned with the depletion of their resources through forced rebates extorted from them by certain large shipping "trusts" (Sharfman, *The Interstate Commerce Commission*, Part I, p. 36 (1931 ed.)).

In its Annual Report to Congress in 1900, the Commission reported that "[s]ince the act to regulate commerce took effect, competition, harmful from the railroad standpoint, has consisted mainly in depar-

tures from the published rate," the result being debilitating rate competition. The carrier, the small shipper, and the public were suffering from secret rate-cutting arrangements, while the large shipping interests profited.[7] The Commission in its Annual Report of January 17, 1902 (pp. 6–16) stated the major problem and requested remedial legislation, as follows (p. 8):

> The [Interstate Commerce] Act requires carriers to publish interstate rates and adhere to such published tariffs. But the tenth section, as construed by the courts, does not punish, otherwise than by a possibly nominal fine, a departure from the published tariff, unless there is actual discrimination between shippers. To convict for unjust discrimination it is necessary to show not merely that the railway company paid a rebate to a particular shipper, but it must also be shown that it did not pay the same rebate to some other shipper with respect to the same kind of traffic moving at the same time under similiar conditions. *As a practical matter this is almost always impossible.* For this reason prosecutions otherwise sustainable can rarely be successful; and this is particularly the case where there is an extensive demoralization of rates, and consequently the greatest need is for the application of criminal remedies. *Departure from the published rate is the thing which can be shown and the thing which should be visited with fitting punishment.* [Emphasis added.]

[7] See Annual Report, I.C.C., December 24, 1900, p. 10. Annual Report, I.C.C., December 1897, pp. 46–48; Annual Report, I.C.C., December 15, 1902, pp. 6–8.

Shortly after the submission of this Report, both the Senate and House Committees on Interstate and Foreign Commerce held hearings on various bills which had been introduced to amend the original Act of 1887. During the hearings before the House Committee,[8] Commissioner Martin A. Knapp, then Chairman of the Interstate Commerce Commission, testified in detail in favor of remedial legislation. He disclosed that, in an investigation by the Commission into the shipping rates of dressed beef and packing-house products originating from Chicago and Kansas City, railroad officials for the first time had "admitted that for years they had constantly and habitually disregarded their published tariffs and had carried at rates below the published tariff an amount of traffic so great that the difference between the published rate and the actual rate amounts to billions of dollars a year, and yet it was the unanimous testimony that all the shippers who were interested in those rates got practically the same rate. There was no discrimination between Armour and Swift and between Hammond and Sulzburger." "No indictment will lie against those shippers, and no prosecution can be carried out and no punishment can be inflicted upon any of them, because you can not prove that there is any actual discrimination between them; they all got the same rate" (*Hearings,* p. 198).

[8] *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, on the Bills to Amend the Interstate Commerce Law* (H.R. 146, 273, 2040, 5775, 8337, and 10930), *April 8–June 17, 1902, 57th Cong., 1st Sess.*

The harm to smaller or prospective shippers from this situation was later pointed out in House Report No. 3765, 57th Cong., 2d Sess., p. 5:

> * * * the effect of such secret cutting of rates is to place in the hands of a small aggregation of shippers the absolute control of the business, because no person can afford to enter into competition who does not receive the cut of rates, and no person is in a position to demand or receive such cut until after he shall have become established in business and have an extensive business behind him.

As Commissioner Knapp pointed out (Hearings, p. 198), what was in issue in this regard was "the case of great aggregations of shippers controlling enormous amounts of traffic which succeed in getting it carried entirely at rates below those which the general public have to pay * * *." The resulting harm to the carriers was also significant. The Elkins Act was "as much a necessary instrument for curbing the unconscionable tactics of the so-called trusts in extorting special favors from the carriers as a desirable extension of federal authority over the railroads." Sharfman, *The Interstate Commerce Commission*, Part 1 (1931 ed.), p. 36.* As Commissioner Knapp explained, a "railroad is not going to give a reduction and suffer under a cut rate if it is sure to get the traffic anyway. It makes that secret bargain in order to get the business from some other road. The revenue of the railroad is depleted, and the man

* Cf. *United States* v. *Miller*, 18 F. Supp. 389, 391 (D. Neb.): "The purpose of the statute is to protect the carrier, as well as the shipper * * *."

who really profits is the shipper who gets the cut rate * * *" (*Hearings*, p. 211).

To meet these problems, Commissioner Knapp repeatedly urged the Committee to adopt legislation which would make a departure from the published rate the test of criminal conduct without the additional, sometimes almost insuperable, burden of proving that such a lower rate operated in a particular shipper's favor (see *e.g., Hearings*, pp. 199–202, 211, 213, 257–264). Chairman Knapp's views were strongly seconded by Joseph W. Fifer, another member of the Interstate Commerce Commission (See *Hearings*, pp. 252–254). Commissioner Fifer unequivocally advocated "that a departure from the published rate should be made a discrimination, and treated as a discrimination" (p. 253).[10]

That Congress proposed to implement these recommendations is clear from the Report of the House Committee on Interstate and Foreign Commerce on Senate Bill No. 7053, which, as amended, became the Elkins Act (H. Rep. No. 3765, 57th Cong., 2d Sess.).[11]

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[10] In a similar vein, Chairman Knapp advised the Senate Committee on Interstate Commerce, that "the amendments of this law [the Interstate Commerce Act] which are most needful are those amendments which are most likely to secure the absolute preservation of tariff rates." *Hearings before the Senate Committee on Interstate Commerce*, "*Railway Freight Rates and Pooling*", 57th Cong., 1st Sess., p. 139.

[11] This bill had been originally introduced in the Senate on January 21, 1903 (36 Cong. Rec. 1030) and thereafter favorably reported, with amendments, by the Senate Committee on Interstate Commerce, but with no explanatory remarks (S. Rept. No. 2675, 57th Cong., 2d Sess., 36 Cong. Rec. 1298). It passed the Senate on February 3, 1903, with no debate (36 Cong. Rec. 1633–1634).

This Report quoted extensively and favorably from the testimony previously given the Committee by Commissioners Knapp and Fifer (pp. 1–5, see *supra*, pp. 15–17) and pointedly stated (p. 5):

> The bill which we recommend provides a penalty, * * * against any person or corporation which shall give or receive any rebate, concession, or discrimination in respect to the transportation of property whereby such property shall be transported at a less rate than that named in the tariffs published and filed in accordance with the interstate-commerce law. This provision makes it a penalty against the railroad company to give to anyone a rate less than the published rate while that rate remains in force, and it also makes it a penalty against any person receiving the benefit of a rate less than the published rates.
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> Chairman Knapp stated to your committee that he favored making it a penal offense to make any departure from the published rates where there be a discrimination or not. * * *

Prior to the overwhelming approval of the bill in the House of Representatives, there was little debate on its substantive provisions (see 36 Cong. Rec. 2151–59), but what there was further indicated the congressional purpose to proceed "upon broad lines." Cf. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 72.[12]

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[12] Congressman Hepburn, the Chairman of the House Committee, thus observed that under "this law it is made criminal to solicit, to receive, equally with the offer of the gift" (36 Cong. Rec. 2158). The bill was adopted in the House of Rep-

2. The Hepburn Act. In 1906, the Elkins Act was amended and strengthened by the Hepburn Act, 34 Stat. 584. The central purpose of the Hepburn Act was to invest the Interstate Commerce Commission with rate-making power (34 Stat. 586, 589–590).[13] In deciding that the Commission should have the power to fix maximum rates for the future, as well as provide redress for past excessive charges, Congress forcefully reaffirmed its conviction that any yielding or departure from published rates would be an intolerable interference with the regulatory scheme. Congress had been made aware of a continuing problem of rebates taking such forms as that of gifts to relatives of shippers.[14] Referring to this problem, the Senate and House reports accompanying the new legislation declared that the Hepburn Act was meant to put "a complete stop to rebates in

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resentatives on February 13, 1903 (36 Cong. Rec. 2159). The Senate thereafter concurred in the House amendments (36 Cong. Rec. 2176), and the bill was signed into law by the President on February 19, 1903 (36 Cong. Rec. 2438).

[13] Though the original Act of 1887 had not expressly granted prospective rate-making power to it, the Interstate Commerce Commission had acted under the assumption that such authority was inherent in the statute. In the middle 1890's, however, this Court decided that such power had not been granted the Commission. *Interstate Commerce Commission* v. *Cincinnati, New Orleans and Texas Pacific Railway Co.*, 167 U.S. 479. See Sharfman, *The Interstate Commerce Commission*, Part I (1931 ed.), pp. 25–27, 45–46.

[14] *Hearings before the Senate Committee on Interstate Commerce pursuant to Senate Resolution No. 288*, 58th Cong., 3d Sess., Vol. 2, p. 818; Vol. 4, p. 2995.

every shape and form. * * *"[15] The grant to the Commission of increased control over rates made it more important than ever that the rates published in the tariffs should be inviolable. As the Sixth Circuit explained in *Louisville & N. R. Co.* v. *Dickerson*, 191 Fed. 705, 709, an early case dealing with the rate-making powers granted by the Hepburn Act, "The cardinal purpose of the provisions for the public establishment of tariff rates is to secure uniformity, reasonableness, and certainty of charges for services. A rate once regularly published is no longer merely the rate imposed by the carrier, but becomes the rate imposed by law; and routes and rates once so established become matter of public right and forbid private contract inconsistent therewith." See also *Louisville and Nashville R.R.* v. *Mottley*, 219 U.S. 467, 476–477.

The legislative histories of both the Elkins Act and the Hepburn Act thus establish that Congress intended to deal with a variety of harmful practices by simple and comprehensive prohibitions of departures by carriers from their filed rates and of solicitations of such departures. In no uncertain terms,

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[15] See S. Rep. No. 1242, 59th Cong., 1st Sess., p. 2; cf. H. Rep. No. 591, 59th Cong., 1st Sess., p. 4.

Insofar as it directly amended Section 1 of the Elkins Act, the Hepburn Act, reinstituted imprisonment as a punishment and added the word "knowingly" and "whether carrier or shipper" to the penalty clause. As we have already noted (*supra*, p. 10, n. 4, this last amendment was to remove any doubt that the Elkins Act prohibitions were applicable to shippers as well as carriers, but was without any intent to limit the Act. See *Union Pacific R. Co.* v. *United States*, 313 U.S. 450, 462–463.

Congress sought to outlaw secret rebates without regard to the form such rebates might take or the person or persons receiving the benefit of the secret rate departures. Congress carefully and intentionally made irrelevant to the prohibitions of rebates such variables as whether demonstrable discrimination among shippers resulted, or whether the amount of the rebate was pocketed by the shipper, a relative of the shipper, his employee, or any other person. The statute was drawn to prohibit all departures and all solicitations of departures from the filed tariff. Any "person", as the statute makes explicit, whose intended acts will result in a departure from the published tariff is subject to the statute's criminal sanctions.

C. JUDICIAL INTERPRETATION OF THE ACT SUPPORTS ITS APPLICATION TO THE CIRCUMSTANCES OF THIS CASE

1. Soon after the adoption of the Elkins Act, the courts recognized that it prohibited "not only discrimination as between shippers, but departure from the tariff rates, irrespective of its actual discriminatory effect." *Vandalia R. Co. v. United States*, 226 Fed. 713, 716 (C.C.A. 7), certiorari denied, 239 U.S. 642. In accord with this interpretation, it was held that a carrier could be convicted of furnishing a rebate to a shipper even though there was no proof that the same concession had been denied to, or had worked a discrimination against, other shippers. The single test was whether the rebate constituted a reduction in the published tariff. See *e.g.*, *Vandalia R. Co.*, *supra*; *Chicago & A. Ry. Co. v. United States*, 156 Fed. 558, 562 (C.A. 7), affirmed, 212 U.S. 563; *Chicago, St.*

P., M. & O. Ry. Co. v. *United States*, 162 Fed. 835, 838–839 (C.A. 8), certiorari denied, 212 U.S. 579–580; *Pennsylvania Co.* v. *United States*, 257 Fed. 261, 264 (C.A. 7); *American Smelting & Refining Co.* v. *Union Pacific R. Co.*, 256 Fed. 737, 742 (C.A. 8). This view has persisted to the present time. See *Shaw Warehouse Co.* v. *Southern Railway Co.*, 288 F. 2d 759, 766 (C.A. 5), certiorari denied, 369 U.S. 850 ("the Elkins Act, * * * prohibits departure from the published tariff rates 'irrespective of its actual discriminatory effect' ").

This Court and the lower federal courts also early determined that the prohibitions of the Elkins Act are not directed to shippers and carriers alone. For example, the Elkins Act prohibits every person, whether or not a carrier, from offering or paying rebates. See *Union Pacific R. Co.* v. *United States*, 313 U.S. 450;[16] *Spencer Kellogg & Sons, Inc.* v. *United States*, 20 F. 2d 459 (C.A. 2), certiorari denied, 275 U.S. 566; *Interstate Commerce Commission* v. *Reichmann*, 145 Fed. 235 (N.D. Ill.). Cf. *Howitt* v. *United States*, 328 U.S. 189, 192–193, where this Court ruled that employees of a railroad who overcharged on tickets for their own personal gain were subject to

[16] In the *Union Pacific* case, this Court held that the Elkins Act prohibited a scheme whereby the City of Kansas City, Kansas, with substantial assistance from the Union Pacific Railroad, gave valuable inducements to produce dealers to persuade them to move their places of business from the produce market at Kansas City, Missouri, to a new terminal at Kansas City, Kansas. The necessary effect of such action was to secure the traffic of the dealers for the Union Pacific.

the criminal sanctions of the Interstate Commerce Act.

From these two established doctrines—that a showing of discrimination is unnecessary to establish a violation of the Act and that persons other than shippers and carriers are subject to its prohibitions—it was but a logical step for the courts to hold that the grant, receipt, or solicitation of the benefits of a carrier's departure from its published rates, *i.e.*, a rebate, is forbidden by the Elkins Act whether it is to be enjoyed by a shipper, his employee, or anyone else. *United States* v. *Delaware, L. & W. R. Co.*, 152 Fed. 269, 273 (C.C. S.D.N.Y.); *Dye* v. *United States*, 262 Fed. 6, 9 (C.A. 4); *United States* v. *Miller*, 18 F. Supp. 389, 390–391 (D. Neb.); *United States* v. *Milwaukee Refrigerator Transit Co.*, 145 Fed. 1007, 1012 (E.D. Wis.); cf. *Interstate Commerce Commission* v. *North Pier Terminal Co.*, 164 F. 2d 640, 643 (C.A. 7), certiorari denied, 334 U.S. 815; *Ohio Tank Car Co.* v. *Keith Ry. Equipment Co.*, 148 F. 2d 4, 7 (C.A. 7), certiorari denied, 326 U.S. 730; *United States* v. *Satuloff Bros.*, 79 F. 2d 846 (C.A. 2); *Terminal Warehouse Company* v. *United States*, 31 F. 2d 951, 958 (D. Md.).

The factual situation in the *Delaware* case, *supra*, decided some four years after the passage of the Act, was strikingly parallel to that involved here. The carrier demurred to an indictment charging it with the payment of rebates on the ground that the payment had not gone to the shippers who had paid the lawful rate, but to the shippers' agent (one Palmer) who had arranged to give the railroad his principals'

business. In overruling the demurrer to the indictment the court said (152 Fed. at 273):

> This indictment is substantially based upon the Elkins Act. That act was intended, among other things, to cover the cases where the rebates are not paid directly to the shipper. It provides in substance that it shall be unlawful for any carrier to give any rebate in respect of the transportation of any property in interstate commerce whereby any such property shall be transported at a less rate than that named in the tariff filed by the carrier. The test by this statute is whether the carrier has transported the property at a less rate than that named in the tariff. * * * the mere fact that a rebate is not paid to the shipper, but is paid to somebody else, is quite immaterial under the Elkins Act. If it is in fact a rebate, concession, or discrimination whereby the property is transported at a less rate than that named in the tariff, the unlawful act is committed. * * *

Appellee Braverman, like Palmer, used his control over the flow of his employer's property in interstate commerce to solicit secret payments from the carrier. Braverman's contention that his conduct does not fall within the scope of the Elkins Act because no advantage to his employer resulted from his conduct is unavailing for the same reason that an identical contention failed in the *Delaware* case: the Act prohibits both the solicitation and the granting of a rebate from the carrier's filed tariff regardless of whether there is a benefit to the shipper.

The *Delaware* case is not alone as precedent directly opposed to the decision below. The same result was reached on similar facts with respect to a refrigerator company that served as a shipping agent for various shippers and solicited rebates in *United States* v. *Milwaukee Refrigerator Transit Co.*, 145 Fed. 1007, 1012 (E.D. Wis.), and with respect to a bookkeeper of the shipper who, with various other persons unrelated to either the shipper or the carrier, solicited and obtained rebates with respect to transportation of property for the shipper in *United States* v. *Miller*, 18 F. Supp. 389. In each of these cases the shipper received no advantage from the rebates, yet in each case an indictment was held to lie under the Elkins Act against parties whose conduct was identical to that of appellee Braverman. See, also *Dye* v. *United States, supra*, where the prohibitions of the Elkins Act were held applicable to an employee of a carrier who utilized his position to obtain personal profit through the disbursement of an unauthorized number of railroad cars to a coal mine which, the court was willing to assume *arguendo*, never itself benefited from the illegal arrangement.[17] In sum, what the Second Circuit said in *Spencer Kellogg & Sons, Inc.* v. *United States*, 20 F. 2d 459, 460–461 (C.A. 2), cer-

[17] The *Dye* case was cited approvingly by this Court in *United States* v. *Koenig Coal Co.*, *supra*, 270 U.S. at 520, where, after stating that the Elkins Act was not to be strictly construed and that the words of the statute should be given their ordinary meaning, the Court detailed the facts of *Dye*, observing that the mine which received an excessive number of cars was "innocent of the inequality", and that *Dye* "did this for his personal profit * * *."

tiorari denied, 275 U.S. 566, is equally applicable here:[18]

> The application of the statute [the Elkins Act] is not limited to shippers and carriers, but includes and punishes any person or corporation whose intended acts result in the transportation of property at less rates than those mentioned in the tariffs lawfully published and filed by common carriers. * * *
>
> Its broad and sweeping language is a clear expression of the intendment of Congress to make the purposes of the act applicable to any person or corporation who might be in a position to commit an act which would accomplish the forbidden result, namely, the transportation of property at less rates than those named in the tariffs published by the carriers. * * *

2. The force of the decisions discussed above is, of course, not weakened by the fact that in specific contexts this Court has emphasized the purpose of the Elkins Act to "place all shippers upon equal terms" (*United States* v. *Union Stock Yard*, 226 U.S. 286, 309; see *Armour Packing Co.* v. *United States*,

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[18] In *Spencer Kellogg*, a grain elevator operator, neither a carrier nor a shipper, paid a rebate to a shipper and was held to have violated the Elkins Act. This decision was cited approvingly in the *Union Pacific* case (313 U.S. at 463) for the proposition that the Elkins Act may be enforced against all parties interested in the traffic.

It is provided in another section of the Elkins Act that, in any proceeding for the enforcement of the Act, "it shall be lawful to include as parties, * * * all persons interested in or affected by the rate, regulation, or practice under consideration * * *" (32 Stat. 848, 36 Stat. 1167, 49 U.S.C. 42).

209 U.S. 56, 72), and has said that "favoritism which destroys equality between shippers, however brought about, is not tolerated." *Union Pacific R. Co. v. United States*, 313 U.S. 450, 462).[19] The prevention of discrimination, while the central purpose of the prohibitions of departures from filed rates, is not the sole purpose of these prohibitions. The Act was intended to protect carriers as well. See *supra*, pp. 13–17. Moreover, the method adopted by Congress for destroying discrimination and favoritism in interstate transportation was the requirement of rigid adherence to the open, published tariff.[20] As this Court has recognized, "there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against prefer-

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[19] It was this argument (R. 18–20) that appellee's counsel made to the district court in support of his claim that the indictment, as framed, did not charge a statutory offense. He cited language from *United States v. General Motors Corporation*, 226 F. 2d 745, 748 (C.A. 3), relying upon the *Union Pacific* case, *supra*, that the "crux of the prohibition in the Elkins Act against rebates is the receipt of an 'advantage' by the shipper * * *."

[20] See *e.g., Chicago & Alton R.R. Co. v. Kirby*, 225 U.S. 155, 165–166 ("The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application."); *New York, New Haven & Hartford R.R. Co. v. Interstate Commerce Commission*, 200 U.S. 361, 392 ("The all-embracing prohibition [was] against either directly or indirectly charging less than the published rates * * *."). To the same effect: *American Express Co. v. United States*, *supra*, 212 U.S. at 531–533; *Armour Packing Co. v. United States*, *supra*, 209 U.S. at 71–72; *Louisville & Nashville Railroad Co. v. Mottley*, *supra*, 219 U.S. at 476–477.

ences and discrimination." *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 440. Whether this relationship is perceived to exist in any particular case is irrelevant. Congress has made the judgment that discrimination and secret rate demoralization are inextricably intertwined and that successfully to root out discriminatory rate-cutting requires an unyielding open tariff. The solicitation in this case sought a departure from the published tariff rate. Congress did not intend that such conduct should go unpunished. On the contrary, it made that very act decisive.

D. THE INTERPRETATION GIVEN THE STATUTE BY THE DISTRICT COURT WOULD HAMPER ENFORCEMENT OF THE ACT AND PREVENT THE EFFECTUATION OF ITS PURPOSES

1. The district court's construction of the statute would adversely effect the economic stability of common carriers. If solicitation of bribes by employees of shippers goes unpunished, a carrier who does not "play along" and pay what the agent demands runs a substantial risk of losing the shipper's business to another carrier. On the other hand, if the carrier were to pay the rebate, it would be transporting property in interstate commerce at a rate less than that fixed by law as just and reasonable. Even assuming that financial loss might not be serious in an isolated case, lasting economic injury could result should the secret "shakedown" mushroom into a generally prevailing practice among traffic managers—as indeed it might. Moreover, it is not improbable that competing carriers, learning of the secret arrangements, would

engage in undisclosed competition for the business of a shipper by making secret financial deals with shipping agents. The upshot of all such secret machinations could well be the very "rate wars, detrimental to the efficiency of the carriers" which it has been a purpose of carrier legislation to eliminate. See *Union Pacific R. Co.* v. *United States*, 313 U.S. 450, 463. The ancient and insidious practice of "squeeze" has no place in the transportation industry.

Carrier efficiency and economic stability were among the principal purposes of the Elkins Act. The Act had the support of the railroads among others (see *supra*, p. 13) and it reflected the aim of Congress "to protect the carrier, as well as the shipper * * *" (*United States* v. *Miller*, 18 F. Supp. 389, 391 (D. Neb.)). Moreover, Congress has continued to stress its legislative judgment as to the importance of guarding the stability and economic well-being of common carriers. Under the "National Transportation Policy" of 1940, 54 Stat. 899, it was declared to be the congressional purpose, *inter alia*, to "foster sound economic conditions in transportation and among the several carriers", to eliminate "unfair or destructive competitive practices", and to have all carrier legislation (of which the Elkins Act is part) "administered and enforced with a view to carrying out" this policy. As this Court has stated, this policy "was designed to eliminate destructive competition not only within each form [of carriage] but also between or among the different forms of carriage". See *Eastern-Central Motor Carriers Association* v. *United States*, 321 U.S.

194, 206; *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80–83. This purpose would be impaired if the Elkins Act were so construed as to permit an environment in which common carriers were faced with the constant threat of financial loss unless they complied with the monetary demands of shipping agents, or found it necessary, because of such demands, to compete among themselves for transportation business through the device of personal bribes to shipping agents.

2. It is not entirely clear whether the basis of the decision of the district court below was that a violation of the Elkins Act requires a showing of discrimination in favor of a particular shipper (see R. 24) or merely requires a showing that whatever rebate is given inures to the benefit of a shipper (see R. 9–10). In either event, however, the decision reimposes upon the government a burden of proof with regard to effects upon shippers which it was the statute's express purpose to remove. See *supra*, pp. 13–18. Tracing the ultimate enjoyment of the benefits of a carrier's departure from his filed rates may well be an impossible task in many instances. In some cases, complex secret arrangements involving rebates routed through a shipper's employee may successfully shield an intended discrimination in favor of particular shippers. In many other situations, even if the shipper knows nothing of the illegal activities of his employee, the grant of rebates to the employee will indirectly result in discriminatory benefits to the shipper who will find him-

self able to retain his employee's services for lesser compensation because of the amounts the employee received from the carrier. It was the central purpose of the Elkins Act to eliminate ambiguities and difficulties of proof such as these by proscribing simply and clearly every departure from filed rates and every invitation, regardless of the issuer, to a carrier to depart from its published rates.

3. In proscribing every secret departure from the published rates, no matter the identity of the beneficiary, the Elkins Act serves the paramount public interest in guaranteeing that transportation rates will be openly arrived at and faithfully complied with. The Act has the function "not merely of regulating the relations of carrier and shipper, *inter se*, but of securing the general public interest in adequate, nondiscriminatory transportation at reasonable rates." *Midstate Horticultural Co. Inc.* v. *Pennsylvania Railroad Co.*, 320 U.S. 356, 361. To determine fairly whether rates are "reasonable" and whether their reduction or increase is required by changing circumstances obviously presupposes that the rates already in force reflect the exact amount being charged. Adequate and efficient regulation of transportation services can hardly be expected to subsist or develop in an atmosphere of secret rates and clandestine competition. In sum, the reliance upon the fact that the published rate is the actual rate being charged to all in like circumstances is at the heart of a successful national transportation system. This case should not represent a departure from that policy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the district court should be reversed and the case remanded for further proceedings under the indictment.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
FRANK I. GOODMAN,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

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